

KENNEDY & MITCHELL, INC.

IBLA 82-1235

Decided October 21, 1982

Appeal from decision of New Mexico State Office, Bureau of Land Management, denying a petition for reinstatement of competitive oil and gas lease NM 26931(OK).

Affirmed.

1. Oil and Gas Leases: Communitization Agreement

Where no approval of a communitization agreement has been given by the Department, production of oil or gas from another lease within a state spacing unit cannot be attributed to a Federal lease on which there is no well capable of producing oil or gas prior to the expiration of the primary term of the lease, and such lease expires by operation of law at the end of its primary term.

APPEARANCES: Herman A. Mundt, Esq., Denver, Colorado, for appellant; John H. Harrington, Esq., Office of the Solicitor, Santa Fe, New Mexico, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Kennedy & Mitchell, Inc., has appealed the New Mexico State Office, Bureau of Land Management (BLM), decision of June 18, 1982, which denied its petition for reinstatement of competitive oil and gas lease NM 26931(OK) because it had expired December 31, 1980, at the end of the primary term of the lease.

Lease NM 26931(OK), containing 5.31 acres in sec. 9, T. 22 N., R. 12 W., Indian meridian, Major County, Oklahoma, was issued January 1, 1976, to Hoover H. Wright, the high bidder at a competitive lease sale held October 21, 1975. Following several mesne assignments, record title was vested in Kennedy & Mitchell, Inc., effective April 1, 1979.

The Oklahoma Corporation Commission, on January 29, 1979, effective as of December 28, 1978, in Order No. 149113, in response to an application of Kennedy & Mitchell, Inc., established a spacing unit of 640 acres, comprising all sec. 9, T. 22 N., R. 12 W., Indian meridian, for the production of gas and condensate from the Tonkawa, Cottage Grove, Oswego, Red Fork (Cherokee), Chester, Mississippi, and Hunton formations. The Order also provided that all royalty interests within the spacing unit established by the order shall be communitized and each royalty owner shall participate in the royalty from the well to be drilled thereon in the relation that the acreage held by him bears to the total acreage of the unit.

Thereafter, a well was completed in the SW 1/4 SW 1/4 sec. 9, in May 1979, and royalty was paid to the Minerals Management Service (MMS) (then the Conservation Division of the United States Geological Survey) for each Federal oil and gas lease in the unit area, sec. 9, T. 22 N., R. 12 W. Lease NM 26931(OK) was listed every month from May 1979 to September 1981 on the copies of Royalty and Remittance Advice (USGS Form 9-614-A), submitted by Kennedy & Mitchell, Inc., with its appeal.

A communitization agreement was transmitted to MMS on November 30, 1981, with a request for approval. The communitization agreement was approved March 2, 1982, by MMS as SCR 238, for the Red Fork and Mississippi formations in sec. 9, T. 22 N., R. 12 W., effective May 1, 1979. The agreement involves 253.97 acres of Federal land, including the 5.31 acres which were included in lease NM 26931(OK), which terminated by its own terms January 1, 1981.

Appellant argues that the long-tested policy of the Department of the Interior has been to follow state well-spacing orders, citing a paper presented by then Regional Oil and Gas Supervisor John R. Schwabrow, with permission of the Director, Geological Survey, to the Rocky Mountain Mineral Law Institute, 8 Rocky Mountain Min. Law Inst. 241 (1963). Appellant states that the gas well producing from the Red Fork and Mississippi formations was completed in sec. 9 under the Oklahoma Corporation Commission spacing order, prior to the expiration date of the primary term of lease NM 26931(OK). Appellant contends that the production under the state spacing unit was constructive production from lease NM 26931(OK) prior to its expiration date, and that the BLM decision stating no production was achieved on the lease is erroneous. Appellant states that the BLM decision ignores the nunc pro tunc approval of the communitization agreement by MMS effective May 1, 1979, well before the end of the primary term of the lease. It argues that the communitization agreement was approved by competent authority and its effective date of May 1, 1979, is binding upon the United States as upon all other parties concerned.

An attorney in the office of the Field Solicitor submitted a late response to the appeal, stating the delay was caused by misplacement of the case file by BLM. Appellant has moved to strike the late response and to have the appeal decided without regard to the response.

The principal issue in this appeal is whether a terminated oil and gas lease within the area of a communitization agreement approved by MMS after the termination of a Federal oil and gas lease but with an effective date prior to the termination of the lease may be considered subject to the communitization agreement retroactively.

The Board has consistently held that for a communitization agreement to qualify a lease as containing a "well capable of producing oil and gas" within the meaning of 30 U.S.C. § 188(b) (1976), the agreement must be approved by the Secretary of the Interior or his delegate. C. J. Iverson, 21 IBLA 312, 82 I.D. 386 (1975).

Where approval of a communitization agreement has been denied and other authority is not present, production from an oil and gas lease within a state spacing unit cannot be attributed to another Federal lease, and absent production, that lease expires at the end of its primary term. Gulf Oil Co., 44 IBLA 292 (1979).

Where no communitization agreement associating Federal lands with a producing well on other lands is filed with MMS prior to the end of the primary term of the lease, and where MMS has no opportunity to approve such a communitization agreement prior to this time, the lease does not qualify for extension beyond its primary term. Cf. Devon Corp., 57 IBLA 131 (1981); Melvin Brown, 49 IBLA 234 (1980).

In Kirkpatrick Oil and Gas Co., 15 IBLA 216, 81 I.D. 162 (1974), this Board held that the Department of the Interior reserves the final authority on approving communitization agreements affecting Federal leases of oil and gas deposits, and that in the absence of an approved communitization agreement involving a specific Federal oil and gas lease, production of oil and gas from such lease is wholly attributable to the lease for computation of royalty due to the United States, notwithstanding a state spacing order. Conversely, it follows that if there is no production from a Federal oil and gas lease not included in an approved communitization agreement, no royalty is due to the United States from such lease.

In Kirkpatrick Oil and Gas Co., 32 IBLA 329 (1977), aff'd, Kirkpatrick Oil and Gas Co. v. United States, No. 80-1117 (10th Cir. Apr. 19, 1982), this Board held that in the absence of an approved communitization agreement involving a Federal oil and gas lease, production from other land in a state spacing unit cannot be attributed pro rata to the nonproductive Federal leases within the spacing unit, and where there is no drilling operation in progress, a producing well, or a well capable of production on such lease, such lease expires at the end of its primary term.

As in the earlier Kirkpatrick case, this case presents the question of the authority of the Federal Government to utilize its own criteria for approval of a communitization agreement involving Federal oil and gas leases. It is undenied that the Federal Government has paramount authority over oil and gas deposits under Federal lands. U.S. Const. art. IV, § 3, cl. 2. Similarly, it is recognized that a state may exercise its police power for conservation purposes.

The applicable statute, section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(j) (1976), provides pertinently:

When separate tracts cannot be independently developed and operated in conformity with an established well-spacing or development program, any lease, or a portion thereof, may be pooled

with other lands, whether or not owned by the United States, under a communitization or drilling agreement providing for an apportionment of production or royalties among the separate tracts of land comprising the drilling or spacing unit when determined by the Secretary of the Interior to be in the public interest, and operations or production pursuant to such an agreement shall be deemed to be operations or production as to each such lease committed thereto.

We believe that the quoted statute indicates clearly that Congress has preempted from the state regulation of communitization or drilling agreements affecting Federal oil and gas leases. As the Tenth Circuit held in Texas Oil and Gas Corp. v. Phillips Petroleum Co., 406 F.2d 1303 (10th Cir. 1967), state law and state police power extend over Federal public domain lands unless and until Congress has determined to deal exclusively with the subject. The Congress in 30 U.S.C. § 226(j) (1976) imposed the requirement that communitization agreements involving Federal and non-Federal lands must be approved by the Federal Government.

When the request for approval of the communitization agreement for the area established in the spacing order of the Oklahoma Corporation Commission was filed with MMS, the spacing unit prescribed by the Corporation Commission was approved. However, until the communitization agreement was approved by MMS, each Federal oil and gas lease in sec. 9, T. 22 N., R. 12 W., Indian meridian, had to stand by itself. As there was no well capable of production of oil and gas within lease NM 26931(OK) on December 31, 1980, it must be held that the lease terminated by operation of law at the conclusion of the initial term of the lease December 31, 1980.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Bruce R. Harris  
Administrative Judge.

